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Supreme Court of the United States

October Term, 1968

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No. 311

CONLEY ELECTRONICS CORPORATION,
d/b/a TELEPROMPTER OF LIBERAL, INC.,

Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION
and UNITED STATES OF AMERICA,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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FEDERAL COMMUNICATIONS COMMISSION
and UNITED STATES OF AMERICA,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Conley Electronics Corporation petitions for a writ of certiorari to review a final judgment of the United States Court of Appeals for the Tenth Circuit entered in this case on April 22, 1968.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, pp. 21-32) is unreported. The memorandum opinion and orders of the Federal Communications Commission (App. B and C, *infra*, pp. 33-36, 39-40) are reported at 7 F.C.C. 2d 120 and 8 F.C.C. 2d 473.

JURISDICTION.

The opinion of the court of appeals (App. A, *infra*, pp. 21-32) was entered on April 22, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED

1. Whether the Commission's CATV Rule requiring same-day non-duplication protection to local television programs is an unreasonable restraint on the receipt and distribution of information and the exercise of free speech in violation of the First Amendment.

2. In the event of a negative finding to the first question, whether, under the CATV Rules, failure to provide for or permit an evidentiary hearing prior to issuance of a summary order directing the halt of existing services of an established business, threatening the life of the business, is a taking of property without due process of law in violation of the Fifth Amendment and pertinent statutes.

CONSTITUTION AMENDMENTS, STATUTES AND REGULATIONS INVOLVED

The First and Fifth Amendments to the Constitution; Sections 309(a) and (e), 312, 313, 314, 316 and 326 of the Communications Act of 1934, 48 Stat. 1064, as amended, 47 U.S.C. 309(a) and (e), 312, 313, 314, 316 and 326; Section 554 of the Administrative Procedure Act, 80 Stat. 378, 5 U.S.C. 554; and Sections 74.1103(e), (f) and (g), and 74.1109(a) and (f) of the Rules and Regulations of the Federal Communications Commission, 47 C.F.R. 74.1103 (e), (f) and (g), and 74.1109(a) and (f) are set forth in Appendix E, *infra*, pp. 46-56.

STATEMENT

This case arises out of memorandum opinions and orders of the Federal Communications Commission ordering petitioner CATV system to comply with the nonduplication provision of the Commission's CATV Rules. The particular rule, §74.1103(e), requires the system to provide exclusivity protection to local stations by blacking out the programs of more distant stations carried by the system which duplicate on the same day programs carried by nearer stations.

Petitioner operates the traditional type community antenna television (CATV)[1] system in Liberal, Kansas, which has no local television broadcast station. Petitioner's CATV system was franchised by the town in 1955 when no off-the-air television was available, and has been in operation there since 1956. Originally, the system brought only two signals to Liberal from the nearest and then only technically available point, Amarillo, Texas, located 139 miles away (R. p. 52).[2] A third Amarillo station was subsequently added (R. p. 53). The carriage of these three stations from Amarillo is the principal service offered by petitioner to its subscribers (R. p. 57).

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[1] During its past term the Court has had occasion to review the operation of CATV systems. *United States v. Southwestern Cable Co.*, 392 U. S. ___, 36 U.S.L.W. 4553 and *Fortnightly Corp. v. United Artists Television, Inc.*, 392 U. S. ___, 36 U.S.L.W. 4656. *Southwestern* explains: "CATV systems receive the signals of television broadcasting stations, amplify them, transmit them by cable or microwave, and ultimately distribute them by wire to the receivers of their subscribers," *supra*, at 4554.

[2] "R." refers to the Commission Record filed in the Court of Appeals and transmitted to the Clerk of this Court.

With the advent of more available television, the Liberal CATV service was enlarged to 12-channel capacity and carriage increased by adding two TV stations from Garden City, Kansas, located 60 miles from Liberal (KUPK-TV, Channel 13 and KGLD-TV, Channel 11) and one from Ensign, Kansas, 50 miles from Liberal (KTVC, Channel 6) (R. pp. 3-4). All of these Kansas stations were established after the Liberal CATV system – KTVC in 1957; KGLD in 1958; and KUPK-TV in 1964. The two Garden City stations are operated as "satellite"[3] stations of Wichita, Kansas, stations located 200 air miles from Liberal and carrying mainly network programs (R. pp. 3-4). The three Kansas stations are available in Liberal by ordinary reception, but the CATV service offers higher quality reception (R. p. 43).

During its eleven-year history, CATV subscribers in Liberal reached a maximum of 2,612, but this number has recently decreased – without decreases in population – to approximately 2,100, or a decline of 20% (R. p. 7). During this period of decline, the TV stations in Garden City and Ensign were founded and have shown a healthy economic growth (R. pp. 4-6). Petitioner has invested a total of $800,000.00 in its Liberal CATV system which has a present depreciated value of $450,000.00. It receives an average annual gross income of $215,000.00 for its service.

In 1966 the FCC promulgated its CATV Rules with its *Second Report and Order*, 2 F.C.C. 2d 725 (1966). These rules were principally designed to protect the healthy maintenance of local television under the Commission's national allocation scheme and to promote the development of UHF television. CATV unchecked, it was felt, would

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[3] A "satellite" station is one controlled by a larger station and operating principally by rebroadcasting the mother-station's signals.

fragment audiences, thus endangering local and UHF television. To achieve these goals, the CATV Rules require certain restraints on new CATV service, carriage of local stations, and same-day non-duplication protection. CATV systems existing prior to March, 1966 were conferred grandfather rights as to distant signals then carried, but such signals are still subject to the operating restrictions of carriage and non-duplication.

Two months after the effective date of the new rules, petitioner requested a waiver of Section 74.1103 of the Commission's newly promulgated rules and sought an evidentiary hearing to demonstrate that (1) imposition of non-duplication would cause the system's demise; (2) the citizens of Liberal were more closely oriented to Amarillo than to the Kansas station locations; and (3) maintenance of the present service would not be harmful to local television. Additionally, petitioner challenged the validity of the new rules.

By order of February 24, 1967, the Commission without hearing summarily denied the petition for waiver and, further, issued an order for petitioner to comply with Rule 74.1103(e) within thirty days (7 F.C.C. 2d 120 (1967)). Petition for reconsideration and application for stay were likewise denied (8 F.C.C. 2d 473 (1967)).

Petitioner sought review of the Commission's orders in the court of appeals, contending that the non-duplication rule was invalid and that failure to provide for a hearing for waiver of rules threatening destruction of an existing business was likewise invalid. The court of appeals affirmed the Commission order on the grounds that the CATV rules thus invoked were reasonable regulations of petitioner's business and that no substantial ground had been demonstrated warranting a hearing.

The Commission's order complained of here, if enforced, would effectively eliminate approximately sixty percent of the present CATV service in Liberal and the

unique feature of petitioner's business since the Kansas stations already operate within conventional antenna range of Liberal (R. pp. 55-57).

REASONS FOR GRANTING THE WRIT

This Court in recently upholding Commission jurisdiction over CATV expressly reserved judgment on the validity of the CATV Rules promulgated. *United States v. Southwestern Cable Co.*, 392 U. S. ____, 36 U.S.L.W. 4553 (No. 363, June 10, 1968). Local carriage and nonduplication are the basic protections which the Commission has designed for local television, Rule 74.1103, 47 C.F.R. 74.1103. The rule applies to more than 1,800 systems now in operation and is a required condition before any new CATV operation may be undertaken. It affects and limits the available television material and viewing habits of approximately 5% of the television audience or an estimated 2,800,000 American homes[4] and has now been in force for over two years. The CATV Rules also permit summary proceedings affecting existing systems, procedures which were invoked against petitioner here. These challenged rules are a substantial part of daily Commission business and rulings. The issues raised here involve fundamental questions of federal and constitutional law and the public's access to the available stream of communications. They also concern the growth and development of a new communications medium capable of rendering substantially greater information sources and materials to the public. The validity of these rules has yet to be passed upon by the Supreme Court.[5] Because of the substantial

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[4] These statistics are drawn from the May 13, 1968 issue of *Television Digest*, Vol. 8, No. 20, p. 3.

[5] See *United States v. Southwestern Cable Co., supra.*

and immediate public, economic and constitutional dimensions of the impact of the CATV Rules on television service, which has become the principal and most influential medium of mass communications in the Nation, the questions raised should be resolved by this Court.

Proper and sound administration of these regulations in accordance with due process of law requires resolution of the secondary point of whether an evidentiary hearing is required before invoking rules against an existing business and threatening its destruction.

1. The Commission's non-duplication rule in Section 74.1103 and its summary order against petitioner are a prior restraint in the reception and distribution of information and tread upon free speech guarantees of the First Amendment.[6] The non-duplication rule provides that the CATV system, upon request of the local television station, will black out imported signals which on the same day duplicate local signals.

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[6] The court of appeals before deciding on the merits asserts that petitioner failed to raise this challenge below and the agency was thus foreclosed from passing upon an important issue. Actually, petitioner did raise the issue in its microwave application before the Commission involving the same system, *TelePrompTer of Kansas, Inc.*, 3 F.C.C. 2d 588 (1966), and incorporated by reference this ground in this case (R. p. 3). The issue was summarily denied in the other proceeding, since the Commission claims to have passed upon it in rule-making proceedings, *Reconsideration of the Second Report and Order*, 6 F.C.C. 2d 309 at 310-312 (1967) (set forth in Appendix D hereto) and has subsequently been summarily dismissed whenever raised before the Commission. *Helena Television Co.*, 12 F.C.C. 2d 564 (1968); *Texas Community Antennas, Inc.*, 12 F.C.C.2d 469 (1968); *Allen's Television Service, Inc.*, 12 F.C.C.2d 515 (1968); *Ellensburg Television Cable Corp.*, 7 F.C.C.2d 110 (1967); *Minnesota CATV, Inc.*, 7 F.C.C.2d 943 (1967); and *TelePrompTer Corp.*, 7 F.C.C.2d 604 (1967). The Commission has persisted in maintaining that the issue has been definitively passed upon and that the Commission will not re-examine it in its opinions and orders.

The Commission maintains that the enforcement of the non-duplication rule eliminates no programming or the public's access to information, but merely eliminates the duplication of program materials already available in order to allow the local stations a competitive advantage. We concede that *simultaneous* duplication does not limit the viewers' access to available program content, merely his choice of channel or station.[7] However, same-day non-duplication very immediately limits the access of the public to information and materials at the *times available to the viewer*. Furthermore, non-duplication eliminates public access to all but one of competing programs broadcast simultaneously by the local stations. For example, the Huntley-Brinkley show is matched against Walter Cronkite and the viewer must choose between the two. But if CATV can import a signal carrying one of the shows at a different time, both are then available. Limiting petitioner's distribution of news, information and program materials otherwise available by cable television is an unreasonable restriction upon the exercise of free speech in violation of the First Amendment.

"The right of freedom of speech and press includes not only the right to utter or to print, but the right to distribute [and] the right to receive . . ." *Griswold v. Connecticut*, 381 U. S. 479, 482 (1965). Communication by any lawful means – motion picture, radio, television, newspaper, closed-circuit, hand-bill, the mails, etc. – falls within the constitutional protections provided by the First Amendment. *ABC v. United States,*

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[7] However, it does eliminate associated public service, public activity and commercial announcements which are of interest to petitioner's subscribers, an important consideration where, as here, those subscribers are oriented more to the "distant" signal city rather than the "local" signal city and, consequently, depend on this source of information.

110 F. Supp. 374 (SD NY, 1953), affirmed, *sub nom., Federal Communications Commission v. ABC,* 347 U. S. 284 (1954); *Weaver v. Jordan,* 64 Cal. 2d 235, 411 P. 2d 289 (1966), *cert. denied,* 385 U. S. 844 (1966).

The entire stream of communications from source to destination is constitutionally protected. This fundamental constitutional principle embraces not only the right of publication but also the rights of dissemination and distribution, as well as of reception. *Saia v. New York,* 334 U. S. 558 (1948); *Winters v. New York,* 333 U. S. 507 (1948); *Martin v. Struthers,* 319 U. S. 141 (1943). Circulation is equally protected. "Liberty of circulating is as essential to that freedom [freedom of press and speech] as liberty of publishing; indeed, without the circulation, the publication would be of little value." *Ex Parte Jackson,* 96 U. S. 727, 733 (1877); *Lovell v. City of Griffin,* 303 U. S. 444 (1938).

Once established that the communication or medium is constitutionally protected, the government shall impose no prior restraints or condition upon the free exercise of a benefit or privilege if the effect thereof is to "inhibit or deter the exercise of First Amendment freedoms." *Sherbert v. Verner,* 374 U. S. 398, 404-405 (1963); and see *LaMont v. Postmaster General,* 381 U. S. 301 (1965).

The primary purpose of the First Amendment, as it relates to speech and press, is to suppress prior restraints upon publication, circulation or distribution. *Joseph Burstyn, Inc. v. Wilson,* 343 U. S. 495 (1952). "Freedoms [guaranteed by the First Amendment] . . . are protected not only against heavy-handed frontal attack, but also from being stifled by more subtle governmental interference." *Bates v. City of Little Rock,* 361 U. S. 510, 523 (1960).

Particularly objectionable is the practice of censorship exercised through the vehicle of licensing authority. "The struggle for the freedom of the press was primarily directly against the power of the licensor." *Lovell v. City of Griffin, supra,* at p. 451. See also, Chief Justice Warren's dissent in *Times Film Corporation v. Chicago,* 365 U. S. 43 (1961). Indeed, any "intimidation" by the government upon *distribution* of constitutionally protected material, no matter what the purpose, is hostile to the mandate contained in the First Amendment and must be terminated forthwith. *Bantam Books v. Sullivan,* 372 U. S. 58, 70 (1963).

In the field of radio and television communications the only permissible restraint has been related to the physical limitation of available frequencies in the spectrum. In *NBC v. United States,* 319 U. S. 190 (1943), the Supreme Court held that *because of limitation of available frequencies* reasonable regulation under the licensing standard of public convenience and necessity is neither a violation of the First Amendment nor is it censorship within the meaning of Section 326 of the Communications Act, 47 U.S.C. 326. In another radio licensing case, *Lafayette Radio Electronics Corp. v. Federal Communications Commission,* 345 F.2d 278 (2d Cir., 1965), the court there upheld the Commission's restrictions on the permissible nature of radio transmissions using the Citizen's Band Radio Service *because of natural limitations in available frequencies.*

In preserving scarce frequency space the Commission through its radio licensing has promoted the exercise of free speech, since if everyone were to broadcast no one could be heard. However, Commission reliance on *NBC* and *Lafayette* as authority for prior restraint of CATV carriage is misplaced, since CATV occupies no frequency space. Unlike the broadcast licensing rules, the non-duplication rules do not promote free speech and are unreasonable. The court of appeals, we feel, failed to properly distinguish between the bases for radio licensing regulation in orderly

use of spectrum space and prior restraint of CATV materials designed to grant television broadcasters additional economic protection. Radio licensing is justified only because it is *necessary* to promote free speech. CATV regulation is unjustified because it exercises prior restraint on the receipt and distribution of information, not in promotion of free speech, but in providing economic protection to broadcasting. The cases relied upon by the court of appeals refer to radio or microwave licensing, and are therefore misapplied to the curtailment of CATV carriage of available information and programming. cf. *Carter Mountain Transmission Corp. v. Federal Communications Commission*, 321 F.2d 359 (D.C. Cir., 1963), *cert. denied*, 375 U.S. 951 (1963) and *Idaho Microwave, Inc. v. Federal Communications Commission*, 352 F.2d 729 (D.C. Cir., 1965).

"Congress has from the first emphatically forbidden the [Federal Communications] Commission to exercise any power of censorship over radio communications." *Farmers' Union v. WDAY*, 360 U.S. 525, 529 (1958). Section 326 of the Communications Act (47 U.S.C. 326) provides that the FCC shall promulgate no regulation or *condition* which infringes upon or interferes with the right of free speech, nor shall the Commission be empowered to take any action constituting censorship over radio communications or over "*signals transmitted by any radio station.*" The CATV nonduplication rule cannot be squared with Section 326.

The Commission attempts to justify its restrictive regulation of CATV as an exercise of its responsibility to make television available to all the people of the United States, and as being in furtherance of its national allocation scheme of television frequencies. *First Report and Order*, 38 F.C.C. 683 at 697 (1965). CATV, the Commission explains, can aid in carrying out the allocation policy, but it may *compete* with local broadcasting in upsetting regional exclusivity provisions in the local station's contracts with network programs by importation and duplication of local programs, *Id.* at 702, para. 52-53. From this observation, the

Commission concludes that CATV's unequal footing with broadcasters renders it an *unfair method of competition* and that the requirements of non-duplication and local carriage are not inconsistent with CATV's *supplemental* role. *Id.* at 705-706, para. 57.

From these findings and conclusions, the Commission has determined that every station is entitled to carriage and non-duplication by CATV, *Id.* at 713, para. 76 "in order to ameliorate the adverse impact of CATV competition upon local stations, existing and potential," *Id.* at 713, para. 77. These findings and conclusions are endorsed and reaffirmed in the *Second Report and Order*, 2 F.C.C.2d 725 at 778, paras. 131-133 (1966). In sum, the Commission has cast CATV in a "supplementary role" to television broadcasting, branded it as "unfair competition," and embarked upon an unprecedented course of economic restriction and program control to protect the favored broadcast licensee.[8]

The Commission action is inconsistent with Section 314 of the Communications Act, 47 U.S.C. 314, which prohibits broadcasters from anti-competitive acts, and Section 313 of the Act, 47 U.S.C. 313, which revokes the licenses of anti-trust violators. FCC regulation of radio broadcasting in the interest of orderly use of rare spectrum space, differentiates it from other regulatory agencies which determine the extent of desirable competition[9] in their regulated industries.

Additionally, CATV regulation is inconsistent with judicial precedent holding that radio broadcasting, despite

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[8] Commissioner Loevinger dissented from this new role of eco-regulation for the Commission, and suggested that "expansion of service is not to be attained by the limitation of competition and the imposition of rigorous regulation but rather by stimulating competition and moderating regulation." 38 F.C.C. 683 at 759.

[9] The public interest factors in maintaining free competition in the regulated industries are examined in *Northern Natural Gas Company v. Federal Power Commission*, __F.2d __ (D.C. Cir. No. 21,333, decided June 21, 1968).

licensing, is an area of free competition, *Lorain Journal Co. v. United States*, 342 U.S. 143 (1951); *Federal Communications Commission v. Sanders Brothers Radio Station*, 309 U. S. 470 (1940); *Easton Publishing Co. v. Federal Communications Commission*, 175 F.2d 344, 346 (D.C. Cir. 1949).[10]

The Commission's new CATV rules now recast the doctrine of free competition in broadcasting to free competition *among* broadcasters, but free *of* competition from any other medium. Such an overlacing is a corruption of the doctrine of free competition and entirely undermines the concept. Moreover, the Commission's initial finding of "unfair" competition is without precedent and somewhat inconsistent with this Court's finding in *Fortnightly Corp. v. United Artists Television, Inc.*, 392 U.S. ___, 36 U.S.L.W. 4656 (No. 618, June 17, 1968), holding that CATV carriage of television signals is not a copyright infringement under the Copyright Act.

Here the Commission represses maximum distribution of communications made possible by technical advances for the economic protection of broadcasting. Petitioner has sought to demonstrate that its operation and distribution does not harm local television. Under these circumstances there is no reasonable protection of the public interest which warrants a restriction on petitioner's First Amendment rights to freely distribute available television signals. Accordingly, the Commission's non-duplication rule and its proscriptive order halting a substantial part of petitioner's distribution without reference to any reasonable public

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[10] See *Carroll Broadcasting Co. v. Federal Communications Commission*, 258 F.2d 440 (D.C. Cir., 1958), where the court held that the doctrine of "free competition" was tempered only to the degree which it could be demonstrated, on the facts and after hearing, that such competition would result in harm to the public interest. But the court was careful to emphasize that the presumption is weighed heavily in favor of free competition and that the task of demonstrating injury to the public interest is "certainly a heavy burden." 258 F.2d at 444.

interest is an unlawful restriction of freedom of speech in violation of the First Amendment.

2. In the absence of a hearing, the issuance of a proscriptive order halting a substantial part of petitioner's business is a deprivation of property without die process of law in violation of the Fifth Amendment. Administrative agencies must observe "procedures which have traditionally been associated with the judicial process." *Hannah v. Larche,* 363 U. S. 420 at 442 (1960).

Modification of a certificate of convenience without hearing raises due process considerations. *Civil Aeronautics Board v. Delta Air Lines,* 367 U.S. 316, 330 (1961), citing *Seatrain Lines v. United States,* 64 F. Supp. 156 at 161 (D. Del. 1946), affirmed 329 U.S. 424 (1947). *Seatrain* held that the ICC could not without a hearing alter or cancel an original certificate given to a water carrier. The lower court had held the order would deprive Seatrain of property without due process of law in violation of the Fifth Amendment, 64 F. Supp. 156 at 161. In affirming this Court noted that *Seatrain* had been conferred "grandfather" rights, as here, and in reliance had expended large sums in its business, which the order would have threatened. See also, *Superior Oil Company v. F.P.C.,* 322 F.2d 601 (9th Cir. 1963), *cert. denied,* 373 U. S. 922 (1964).

Standard Airlines, Inc. v. Civil Aeronautics Board, 177 F.2d 18 (D.C. Cir. 1949) held that a regulatory agency could not create a special class of irregular carrier by granting "letters of registration" with the right to revoke it at any time rather than a certificate of public convenience, in an attempt to circumvent a hearing on revocation or alteration of rights affecting investment and business property. *Id.,* at 20. Here the same device has been employed against the petitioner and other CATV operators who are not license holders. Yet, the Commission, in its "special regulatory control" over CATV business, seeks to alter and destroy petitioner's business by proscriptive order without

permitting the elementary safeguards of due process as provided by the Fifth Amendment.

Gonzales v. Freeman, 334 F.2d 570 (D.C. Cir. 1964), sets forth due process guidelines in review and suspension of operating privileges: How was the individual to be hurt? What governmental interest was to be protected? How would the governmental interest be affected, if at all, by extending procedural safeguards to cover the challenged action?

Applying these principles to the instant case: petitioner is faced with destruction of its entire investment; the admitted governmental interest is protection of local broadcasting which has failed to demonstrate or even allege harm; as to procedural safeguards, other than convenience, there appears to be no immediate or compelling government interest requiring summary proceedings.

The Commission action has threatened the property and investments of petitioner's eleven year business, established in reliance upon the Commission's licensing of common carrier microwave service to furnish undiluted programming to petitioner's business, and incurred in the period during which the Commission steadfastly maintained it had no jurisdiction over CATV. The Commission's rules in failing to provide for hearing in the issuance of proscriptive orders threatening destruction and economic injury are in violation of due process guarantees of the Fifth Amendment.

The conduct and requirements for adjudication and rule making by government agencies are subject to the provisions of the Administrative Procedure Act, 5 U.S.C. 551 *et seq.*, which provides that "adjudication" shall be determined on the record after opportunity for a full evidentiary hearing (5 U.S.C. 554).

The Communications Act of 1934, 47 U.S.C. 151 *et seq.*, contains similar safeguards for administrative hearings affecting the rights of parties. The Act provides for a full evidentiary hearing for application for license where there

exists a substantial and material issue of fact, 47 U.S.C. 309(e) and for full hearing for suspension of an existing license, 47 U.S.C. 303(m)(2). Before revoking a license or permit, the Commission must serve a show cause order and allow a party a full hearing, where the *burden of proof is upon the Commission,* 47 U.S.C. 312(c) and (d). Moreover, even a modification of license or construction permit entitles a party to full evidentiary hearing with the burden of proof placed upon the Commission, 47 U.S.C. 316. See *Civil Aeronautics Board v. Delta Air Lines,* 367 U.S. 316 (1961), concerning a modification of a certificate of convenience in violation of Section 401(g) of the Federal Aviation Act of 1958, 49 U.S.C. 1371(g).

In the rules of conduct and operation for CATV, the Commission has initially drafted its regulations with the presumption or taint that CATV operation is "unfair" and adverse to the "public interest." *First Report and Order,* 38 F.C.C. 683, 713 (1965). The rules permit a petition for waiver of the rules which alter the conduct of existing business and suspend such service, Section 74.1109. However, in acting on waiver petitions the Commission may summarily grant or deny the petition or specify other procedures, including oral argument or full evidentiary hearing, Section 74.1109(f). In short, the Commission has the option on the means of procedure. Since it appears before the Commission with the taint that its operations are adverse to the public interest, the CATV system must overcome this presumption before gaining the relief sought, which, in consequence, shifts the burden of proof contrary to the APA and the Communications Act.

Although the Commission did not initially license or otherwise authorize the existing operation of petitioner's CATV service, the Commission now seeks to exercise complete licensing authority over petitioner's business, while relegating it to "second class" business status. The practice of creating a special class over which the administrative body seeks greater regulatory control was condemned

in *Standard Airlines, Inc. v. Civil Aeronautics Board*, 177 F.2d 18 (D.C. Cir. 1949). Notwithstanding the statutory and regulatory requirements, as a matter of elementary fairness, it would seem that the Commission should give, at minimum, the same protections and safeguards to the CATV industry, over which it has assumed indirect control, as it allows to the broadcasting industry, over which it has direct statutory licensing control.

Petitioner's verified petition for waiver of Section 74.1103 of the Commission's rules contains substantial and material factual issues warranting a hearing. See section 309(e) of the Act, 47 USC 309(e) and *Ashbacker Radio Co. v. Federal Communications Commission*, 326 U.S. 327 (1945); *Folkways Broadcasting Co. v. Federal Communications Commission*, 375 F.2d 299 (D.C. Cir. 1967). At heart is petitioner's statement that program exclusivity will destroy its only marketable feature and cause the demise of the system. Additionally, petitioner alleged that there was no corresponding injury to local stations in not receiving program exclusivity. Despite these uncontroverted verified allegation, the Commission rejected petitioner's statements and concluded as a matter of fact that disruption of CATV is minimuzed by its ruling. As to the absence of corresponding injury, the Commission ruled that "a broadcaster need not show specific injury." Here the broadcasters failed to show *any* injury.

This Court's decisions in *United States v. Southwestern Cable Co.*, 392 U.S. __, 36 U.S.L.W. 4553 (No. 363 June 10, 1968); *United States v. Storer Broadcasting Co.*, 351 U.S. 192 (1956); and *Federal Power Commission v. Texaco*, 377 U.S. 33 (1964), do not hold to the contrary, since those cases did not involve the roll back of systems whose existence pre-dated promulgation of the rules.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari to the Tenth Circuit Court of Appeals should be granted.

Respectfully submitted,

JOHN P. COLE, JR.
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Counsel for Petitioner

July 19, 1968

APPENDIX A

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

March Term 1968

CONLEY ELECTRONICS CORPORATION d/b/a TELEPROMPTER OF LIBERAL, INC.,

Petitioner,

v. No. 9503

FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES OF AMERICA,

Respondents,

SOUTHWEST KANSAS TELEVISION CO., INC. KANSAS STATE NETWORK, INC., and KAKE-TV AND RADIO, INC.,

Intervenors.

ON PETITION FOR REVIEW OF ORDERS OF THE FEDERAL COMMUNICATIONS COMMISSION

[April 22, 1968]

* * * * *

Before MURRAH, Chief Judge, HILL, Circuit Judge and CHRISTENSEN, District Judge.

MURRAH, Chief Judge

Petitioner, Conley Electronics Corporation, the owner and operator of a community antenna television (CATV) system in Liberal, Kansas, seeks review under §402(a) of the Communications Act of 1934, as amended, 47 U.S.C. §402(a), of a memorandum opinion and order of the Federal Communications Commission denying Conley's petition for a waiver of the nonduplication requirements of the Commission's rules, 47 C.F.R. §74.1103(f). The waiver request was denied by the Commission without a hearing. Conley (1) challenges the validity of the nonduplication rule, asserting that it is outside the jurisdiction of the Commission and violative of the First Amendment; and (2) contends that the failure to provide a hearing is violative of various procedural statutes and deprives him of due process of law.

A brief review of the development and regulation of CATV may prove beneficial to an understanding of the questions involved. A CATV system is a facility which, by means of high antennae, picks up the signals broadcast by one or more television stations and redistributes such signals by wire or cable to the homes of subscribing members of the community served by the system. First Report and Order, 38 F.C.C. 683, 684, (1965). Subscribers pay an initial installation charge and a monthly fee for this service. Some systems use microwave relay stations to relay signals to the CATV antennae. During the early years of its development, CATV was used almost exclusively to bring television signals to areas where the mountainous terrain made reception difficult or the sparse population made the operation of a local station economically unfeasible. In subsequent years, however, CATV systems expanded the scope of their service and began distributing programs originating from distant

stations into areas which already had local television stations. The result was a unanimous cry for regulation by the local broadcasters, who feared that an enlargement of the number of stations available in a community would splinter the market, thereby causing a decrease in audience size and a reduction in the advertising revenues of the local stations. See Note, The Wire Mire: The FCC and CATV, 79 Harv. L.R. 366 (1965); Note, CATV and Copyright Liability, 80 Harv. L.R. 1514 (1967).

Following an initial disclaimer of jurisdiction, 26 F.C.C. 403, 427-28 (1959), the Commission, after a general rule-making proceeding which attracted numerous and voluminous comments from interested parties, asserted jurisdiction over CATV systems using microwave facilities to transmit their signals, and adopted certain rules involving their operation. First Report and Order, *supra*. At the same time, a Notice of Inquiry and Notice of Proposed Rule Making, 1 F.C.C. 2d 453 (1965), was released looking toward regulation of those systems not using microwave relay facilities. Again, formal and informal comments were accepted by the Commission. Subsequently, in March 1966, the Commission asserted jurisdiction over all CATV systems and adopted applicable rules. Second Report and Order, 2 F.C.C. 2d 725 (1966). These rules provide, *inter alia*, that CATV systems (1) must, upon request, carry the signals of local stations; and (2) cannot, on the same day, carry a signal which duplicates a program of a local station. 47 C.F.R. §74.1103(a)(f). These rules are commonly refered to, respectively, as the "carriage" and "nonduplication" rules. We are concerned only with the nonduplication rule.

The Commission's decision to adopt the rules rested on its determination that failure to carry the signals of the local stations and duplication of their programs on the same day constituted "unfair competitive practices" on the part of the CATV systems. The Commission was

concerned lest CATV operations ultimately drive out television broadcasting service, thus depriving the public as a whole of free service, service to outlying areas,[1] and local service with local control and selection of programs. First Report and Order at p. 700. The Commission concluded, therefore, that in view of its statutory obligation under the Communications Act to make television service available, so far as possible, to all people of the United States on a "fair, efficient and equitable" basis, 47 U.S.C. §307(b), adoption of CATV rules was necessary in the public interest.

In addition to the carriage and nonduplication rules, the Commission adopted Rule 74.1109, 47 C.F.R. §74.1109, which provides that "upon petition by a CATV system, * * * the Commission may waive any provision of the rules relating to the distribution of television broadcast signals by CATV systems * * * ." The rule requires, however, that the waiver petition "state *fully and precisely all pertinent facts and considerations* relied upon to demonstrate the need for the relief requested and to support a determination that a grant of such relief would serve the public interest."

Conley's CATV system has been in operation in Liberal, Kansas since 1956. It carries the signals of six television stations into the homes of 2,100 subscribers. Three of these stations are admittedly so-called "local" stations, located within 60 miles of Liberal. The other three are distant stations, located approximately 140 miles away in Amarillo, Texas. The signals from the Amarillo stations are relayed by microwave facilities to a point where they are received by Conley and retransmitted to the subscribers.

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[1] Because of the prohibitive cost of extending the cables beyond heavily built-up areas, CATV systems cannot serve many persons reached by television broadcast signals. First Report and Order at p. 699.

In June 1966, two months after the effective date of the Commission's CATV rules, Conley filed a petition for a waiver of the nonduplication rule. Under that rule, petitioner would be required to delete those programs from the Amarillo stations which duplicate the programs broadcast by the local Kansas stations if released on the same day. Conley based its waiver request upon the grounds, *inter alia*, that operation of its CATV system had no discernible adverse economic effect on the three local Kansas television stations; that, on the other hand, compliance with the rule might have an adverse financial impact on the petitioner's CATV system and might lead to a disruption of service; that, moreover, the Commission had no authority to adjudicate by rule matters of "unfair competition"; and that, in any event, the rule should not be applied without first affording Conley a hearing.

In denying the waiver request, the Commission held that the reasons for applying the nonduplication rule without a specific showing of adverse economic impact on the local station had been carefully explained in the Second Report and Order; and that Conley had supplied no factual support for its allegation of disastrous financial impact or disruption of service. The Commission also rejected Conley's challenge of authority to issue the rule, and held that Conley's threshold factual allegations showed no necessity for a hearing.

When the Commission subsequently denied Conley's petition for reconsideration, this petition for review was filed, and we granted Conley's motion for a stay.

Due to the manner in which Conley has intermixed and proliferated his various contentions, it is difficult to discern exactly what errors are asserted. We will, however, consider and dispose of those questions which we are able to glean from the petitioner's arguments.

Conley's initial contention seems to be that the nonduplication rule is invalid because: (1) it rests upon a finding by the Commission that CATV duplication constitutes "unfair competition", a determination that the Commission has neither the authority nor the jurisdiction to make; and (2) it constitutes an improper restraint on free speech in violation of the First Amendment. In support of his first assertion, Conley argues that the rule is in conflict with *F.C.C. v. Sanders Brothers Radio Station*, 309 U. S. 470 (1940), where the Supreme Court emphasized that "the [Communications] Act recognizes that the field of broadcasting is one of free competition." *Id* at 474.

We cannot agree with Conley's postulate. Indeed, we think the rule is not only consistent with Sanders, but affirmatively implements it. In Sanders the Court held that since it is not the purpose of the Act to protect a licensee against competition, economic injury to an existing station, standing alone, is not a ground for denying the licensee application of a new station. But the Court was quick to add that the question of competition becomes vitally important, and should not be disregarded by the Commission, when economic injury to an existing station may result in a diminution or reduction of broadcast service to the public. See *Carroll Broadcasting Co. v. F.C.C.*, 258 F.2d 440 (1958). As we have seen, it was precisely this prospect of an overall reduction of television service, hence injury to the public, which prompted the Commission to adopt its CATV rules. We hold that the nonduplication rule was a reasonable exercise of the Commission's authority. See *Wheeling Antenna Co., Inc. v. F.C.C.*, ___ F.2d ___ (4 CA, Feb. 28, 1968).

As to Conley's claim that the nonduplication rule treads upon its First Amendment right to freely distribute available television signals, the short answer is that

the argument comes too late. This contention was not presented before the Commission and, as Chief Justice Vinson emphasized in *Unemployment Compensation Commission of Alaska v. Aragon,* 329 U. S. 143, "A reviewing court usurps the agency's function when it sets aside the administrative determination upon a ground not theretofore presented and deprives the Commission of an opportunity to consider the matter, make its ruling, and state the reasons for its action." *Id* at 155. See also *WLIL, Inc. v. F.C.C.,* 352 F.2d 722 (1965); *Florida Gulfcoast Broadcasters, Inc. v. F.C.C.,* 352 F.2d 726 (1965); *Presque Isle TV Co., Inc. v. F.C.C.,* ___ F.2d ___ (CA 1, Dec. 18, 1967). Moreover, the argument is without merit. Several courts have rejected similar contentions in upholding a denial by the Commission of a license to a microwave carrier seeking to serve a CATV system. See *Carter Mountain Transmission Corp. v. F.C.C.,* 321 F.2d 359 (1963); *Idaho Microwave, Inc. v. F.C.C.,* 352 F.2d 729 (1965). See also *National Broadcasting Co. v. United States,* 319 U.S. 190 (1943). Conley seeks to distinguish those cases on the ground that they were concerned with licensing rather than the direct regulation of CATV systems. We think, however, that the cases are indistinguishable. In both situations what is involved is reasonable regulation in the public interest. Cf. *Buckeye Cablevision, Inc. v. F.C.C.,* 387 F.2d 220 (1967).

This brings us to what appears to be the best of Conley's case – that the Commission's failure to provide for an evidentiary hearing before ordering the petitioner to comply with the nonduplication rule violated the requirements of the Communications Act and the Administrative Procedure Act, and deprived him of due process of law.

Preliminarily, Conley seems to suggest that he is entitled to a hearing under the following provisions of the Communications Act: §309(e), which provides for a hearing upon any application for a license where there exists

a substantial and material question of fact; §303(m)(2), which requires a petitioner prior to the suspension of an operator's license; §312(c), which provides for a hearing prior to revocation of a license; and §316, which bars any modification of a license without a hearing. The short answer is that Conley, by its own admission, is neither an applicant for a license nor a licensee. It is clear, therefore, that the various statutory provisions relied upon are inapplicable by their own terms.

Avoidance of this conclusion is sought by the apparent suggestion that the Commission, through its CATV rules, is, in fact, exercising "complete licensing authority" over petitioner's business, and should, therefore, prior to modifying that business, afford Conley all the procedural rights normally afforded licensees. The foible in this argument is that even if Conley were a licensee of the Commission, it would have no automatic right to a hearing under any of the cited provisions of the Communications Act.

In *United States v. Storer Broadcasting Co.*, 351 U. S. 192 (1956), the FCC amended certain of its rules to provide, in effect, that a license for a television broadcast station would not be issued to any party having an interest in five such stations. On the same day Storer's pending application for an additional station was summarily dismissed because he already had five stations. Storer sought review of the Commission's order, contending that the rules, as amended, were in conflict with the mandates of §309 of the Communications Act that applicants must have a full hearing before denial of an application for a license. The Supreme Court held that although §309 did require a "full hearing", this did not withdraw from the Commission the rule making authority necessary for the orderly conduct of its business. In that respect, the Court declared:

> "We read the Act and Regulations as providing a 'full hearing' for applicants who have reached the existing limit of stations, upon their presentation of applications conforming to [the Commission's waiver rule], that set out adequate reasons why the Rules should be waived or amended. The Act, considered as a whole, requires no more. We agree with the contention of the Commission that a full hearing, such as required by §309(b) * * * would not be necessary on all such applications. As the Commission has promulgated its Rules after extensive administrative hearings, it is necessary for the accompanying papers to set forth reasons, sufficient if true, to justify a change or waiver of the Rules. We do not think Congress intended the Commission to waste time on applications that do not state a valid basis for a hearing. If any applicant is aggrieved by a refusal, the way for review is open." *Id.* at 205.

Storer was followed in *Federal Power Commission v. Texaco,* 377 U. S. 33 (1964). There the FPC adopted a rule prohibiting certain pricing provisions in the rate schedules of independent producers of natural gas, and subsequently rejected, without hearing, applications for certificates of public convenience and necessity which contained rate schedules with the prohibited provisions. We held that the Commission's rule could not be applied to deprive a certificate applicant of the adjudicatory hearing guaranteed him by §7 of the Natural Gas Act. *Texaco, Inc. v. F.P.C.,* 317 F.2d 796 (1963). The Supreme Court taught us, however, that "the statutory requirement for a hearing under §7 does not preclude the Commission from particularizing statutory standards through the rule-making process and barring at the threshold

those who neither measure up to them nor show reasons why in the public interest the rule should be waived." 377 U.S. 33, 39.

It is thus clear that when rules of general application are promulgated in a valid rule-making proceeding, as was done here, they may be generally applied by the Commission without individual adjudicatory hearings unless a party, claiming to be agrieved, sets forth reasons why the public interest would be served by an individualized waiver of the rule. See *California Citizens Band Assn. v. United States,* 375 F.2d 43 (1967); *American Airlines, Inc. v. Civil Aeronautics Board,* 359 F.2d 624 (1966); *Interstate Broadcasting Co. v. F.C.C.,* 323 F.2d 797 (1963). Conley claims its petition comes within the teachings of Storer and Texaco, and also within the requirements of Rule 74.1109, and sets forth facts entitling it to a waiver or at least a hearing. Suffice it to say that after carefully examining Conley's petition, we agree with the Commission that neither was justified. Some of the reasons listed by Conley were questions already considered and rejected by the Commission at the rule-making proceeding leading to the adoption of the CATV rules. The remaining allegations failed to factually demonstrate that the public interest would be served by exempting Conley from the sweep of the nonduplication rule. In short, we do not think Conley stated a claim upon which relief could be granted.

Nor is the Administrative Procedure Act helpful. It imposes no requirement of an adversary hearing before an agency, but only specifies the procedure to be followed when a hearing is required by some other statute. 5 U.S.C. §554. See also *Webster Groves Trust Co. v. Saxon,* 370 F.2d 381 (1966).

The net result of all this is said to deprive Conley of the full use of its property, and that to do this without a hearing violates due process of law. This due process

issue was not specifically raised or treated in either Storer or Texaco, but we think it is fully answered by the Second Circuit in *Air Lines Pilots Assn., International v. Quesada,* 276 F.2d 892 (1960). There the Administrator of the Federal Aviation Agency promulgated a rule barring individuals over 60 years of age from serving as aircraft pilots. The pilots complained that the regulation deprived them of property in their pilots' licenses without due process. Chief Judge Lumbard rejected this contention:

> "Nor does the regulation violate due process because it modifies pilots' rights without affording each certificate holder a hearing. Administrative regulations often limit in the public interest the use that persons may make of their property without affording each one affected an opportunity to present evidence upon the fairness of the regulation. See *United States v. Storer Broadcasting Co., supra; Bowles v. Willingham,* 1944, 321 U. S. 503, 519-520 * * * . Obviously, unless the incidental limitations upon the use of airmen's certificates were subject to modification by general rules, the conduct of the Administrator's business would be subject to intolerable burdens which might well render it impossible for him effectively to discharge his duties. All changes in certificates would be subject to adjudicative hearings, including appeals to the courts, and each pilot whose license was affected – here some 18,000 – might demand to be heard individually. * * * All private property and privileges are held subject to limitations that may reasonably be imposed upon them in the public interest." *Id.* at 896.

See also *Bi-Metallic Investment Co. v. State Board of Equalization,* 239 U. S. 441 (1915).

Nothing said here or in the case law forecloses a hearing on a petition which sets forth "reasons, sufficient if true, to justify a change or waiver of the Rules" in the public interest. We simply hold that no such reasons were shown by Conley's petition.

Finally, Conley seems to contend that, in any event, it was entitled to a hearing under §312 of the Communications Act, which authorizes the Commission to enter a cease and desist order only after a hearing to a party who: "(1) has failed to operate substantially as set forth in a license, (2) has violated or failed to observe any of the provisions of this chapter * * * , or (3) has violated or failed to observe any rule of regulation of the Commission * * * ." Conley says that the Commission's order directing it to comply with the nonduplication rule "within thirty (30) days" is tantamount to a cease and desist order under §312. The short answer is that Conley did not fail to observe the provisions of a license or a statute. Nor did he violate the nonduplication rule, since the filing of his waiver petition automatically stayed the applicability of the rule. See 47 C.F.R. §74.1109(h). Conley was not a party to whom a cease and desist order could issue. Rather than a cease and desist order, we think the Commission's order was merely a directive giving Conley notice of a date certain when it would be expected to be in compliance with the nonduplication rule.

Affirmed.

APPENDIX B

FCC 67-208

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

Washington, D. C. 20554

In re	)
TelePrompTer of Liberal, Inc., Liberal, Kans.	)
Request for Waiver of Sections 21.712 and 74.1103 of the Commission's Rules	)

MEMORANDUM OPINION AND ORDER

(Adopted February 15, 1967)

By the Commission: Commissioner Bartley dissenting and issuing a statement; Commissioners Loevinger and Johnson concurring in the result; Commissioner Wadsworth absent.

1. On June 17, 1966, TelePrompTer of Liberal, Inc., owner and operator of a CATV system in Liberal, Kans., and TelePrompTer Transmission of Kansas, Inc., a communications common carrier which provides service to the Liberal CATV system, filed a joint petition to set aside, stay, annual, suspend, and/or waive CATV nonduplication rules, in which it requested waiver of the program exclusivity requirements of sections 21.712(g) and 74.1103(e) of the Commission's rules; the petition was opposed by Kansas State Network, Inc., licensee of television broadcast station KGLD, Garden City, Kans., and by KAKE TV and Radio, Inc., licensee of station

KUPK-TV, Garden City, Kans. A reply to the oppositions was filed by the joint petitioners.

2. TelePrompTer of Liberal operates a 6-channel, microwave-fed CATV system which supplies approximately 2,200 subscribers with the following television signals: KTVC (CBS), Ensign, Kans.; KGLD (NBC) and KUPK-TV (ABC), Garden City, Kans.; KFDA-TV (CBS), KGNC-TV (NBC), and KXII (ABC), Amarillo, Tex. Liberal is within the predicted grade B contours of the Kansas stations and two of them – KGLD and KUPK-TV – seek program exclusivity on the Liberal CATV system, while TelePrompTer of Liberal and its common carrier ask a waiver of this requirement.

3. Petitioners advance the following arguments in support of the waiver request: *(a)* That operation of the Liberal CATV system has no discernible adverse economic effect on the three Kansas television stations; *(b)* that furnishing program exclusivity may have an adverse financial impact on the CATV system; *(c)* that furnishing program exclusivity may lead to disruption of service; *(d)* that in view of the copyright decision in *United Artists Television, Inc. v. Fortnightly Corporation,* 255 F. Supp. 177, appeal pending before the U. S. Court of Appeals for the Second Circuit (docket No. 30767), a broadcaster should not be entitled to assert its right to program exclusivity without first agreeing to indemnity a CATV operator for its potential copyright liability; *(e)* that a broadcaster should be required to pay the CATV operator's cost resulting from implementation of program exclusivity; *(f)* that the program exclusivity requirement should not be applied without first allowing the CATV operator a hearing; and *(g)* that since it has been held that a CATV system's operation does not constitute unfair competition, citing *Cable Vision, Inc. v. KUTV, Inc.,* 335 F.2d 348, cert. den. 379 U. S. 989, this is an improper basis for the Commission's assertion of jurisdiction.

4. The petitioners' contentions are ruled upon, as follows: *(a)* The Commission explained, in the *Second Report and Order,* its reasons for requiring program exclusivity without requiring a showing of adverse economic impact; *(b)* petitioners have supplied no factual support for the allegation of disastrous financial impact; *(c)* when the Commission adopted the *Second Report and Order,* it determined that same-day program exclusivity would not have an unduly disruptive effect on CATV service, and petitioners fail to point to any special circumstances which would warrant a departure from this view; *(d)* no copyright liability question can arise where only deletion of a program on a CATV system is at issue; *(e)* TelePrompTer of Liberal has elected to carry distant signals and, under our rules and their underlying rationale, it, therefore, has the burden of effecting the required same-day program exclusivity, absent a showing of unusual or extraordinary circumstances warranting some other appropriate course, which showing has not been made here; *(f)* section 74.1109(f) of the rules makes provision for hearings; however, petitioners' threshold factual allegations do not persuade us that a hearing is necessary here; and *(g)* the *KUTV* case did not consider and purport to deal with the unfair competition aspect developed in the *Second Report and Order* under the public-interest standard of the Communications Act of 1934, as amended. That case held only that parties in a private suit must proceed under copyright law, rather than on the concept of unfair competition or interference with contractual rights, in view of such decisions as *Sears, Roebuck & Co. v. Stiffel Co.,* 376 U. S. 225, and *Compco Corp. v. Day-Brite Lighting, Inc.,* 376 U. S. 234.

5. In view of the foregoing, the Commission finds that a grant of the requested waivers of sections 21.712 (g) and 74.1103(e) of the Commission's rules would not be consistent with the public interest.

Accordingly, *It is ordered,* This 15th day of February 1967, that the joint petition to set aside, stay, annul, suspend, and/or waive CATV nonduplication rules, filed jointly by TelePrompTer of Liberal, Inc. and TelePrompTer Transmission of Kansas, Inc., on June 17, 1966, *Is Denied.*

It is further ordered, That TelePrompTer of Liberal, Inc., *Is directed* to comply with the requirements of section 74.1103(e) of the Commission's rules on its CATV system at Liberal, Kans., within 30 days of the release date of this memorandum opinion and order.

Federal Communications Commission,
Ben F. Waple, *Secretary.*

Dissenting Statement of Commissioner Robert T. Bartley

Assuming, arguendo, the validity of the CATV rules, I would here grant full relief as requested by the CATV.

APPENDIX C

FCC 67-652

[Caption omitted]

MEMORANDUM OPINION AND ORDER

(Adopted June 7, 1967)

By the Commission: Chairman Hyde absent; Commissioner Bartley dissenting and issuing a statement; Commissioner Loevinger dissenting.

1. On February 24, 1967, the Commission released its opinion and order in *TelePrompTer of Liberal, Inc.*, FCC 67-208, 7 FCC 2d 120, in which it denied requests for waiver of the program exclusivity requirements of sections 21.712(g) and 74.1103(e) of the Commission's rules, filed jointly by TelePrompTer of Liberal, Inc., owner and operator of a CATV system in Liberal, Kans., and TelePrompTer Transmission of Kansas, Inc., a communications common carrier, and directed that TelePrompTer of Liberal, Inc., comply within 30 days. On March 23, 1967, TelePrompTer of Liberal, Inc., filed a petition for reconsideration of the cited opinion and order,[1] which is opposed by KAKE-TV and Radio, Inc., licensee of station KUPK-TV, Garden City, Kans.; Southwest Kansas Television Co., Inc., licensee of television broadcast station KTVC, Ensign, Kans.; and Kansas State Network, Inc., licensee of television broadcast station KGLD, Garden City, Kans.

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[1] A motion for temporary stay, filed by TelePrompTer of Liberal, Inc., on Mar. 24, 1967, was denied Apr. 26, 1967. *TelePrompTer of Liberal, Inc.*, FCC 67-506, ___ FCC 2d ___.

2. TelePrompTer advances a plethora of allegations[2] of which the following appear to be most pertinent: *(a)* That the stations receiving program exclusivity are satellities (sic) of more distant stations; *(b)* that implementation of of program exclusivity will, in effect, drprive it of three channels of service and adversely affect its ability to continue profitable operation; *(c)* that in 1965 it all-banded its CATV system at considerable cost; *(d)* that the Commission has employed a "template" approach in ruling on its waiver request; *(e)* that there is a greater community of interest between Liberal and Amarillo than between Liberal and the communities to which the stations here involved are licensed; *(f)* that the Commission recognizes that it does not license CATV systems, yet, at the same time, denies CATV operators procedural protections which would be available to a broadcast licensee before modification of its license; *(g)* that such action without hearing violates "due process" concepts; *(h)* that a hearing before the Commission in these circumstances culminated in a decision that nonduplication was not required nor warranted; and *(i)* that a hearing is required before the Commission's opinion and order can become effective.

3. We have lettered petitioner's allegations in the preceding paragraph so that they can be ruled upon seriatim; *(a)* petitioner did not advance this argument in its initial waiver request and does not justify its failure to do so — consequently, the argument is barred by section 1.106 of the rules. Further, the rationale of the *Second Report and Order* would, on the present facts, require protection of satellites; *(b)* we must again reject this argument on the ground that it has no factual support. Nor is the impact of new broadcast service on a CATV system equitable with the requirement that a duplicated program

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2. The findings of fact to which these allegations relate are contained in FCC 67-208.

be deleted; *(c)* at the time it all-banded its CATV system, the proceedings in dockets Nos. 15069-15072, looking toward imposition of nonduplication conditions, were in process. TelePrompTer was thus on actual notice of the possibility that it might be required to furnish program exclusivity, and is, therefore, barred from asserting this as an equity; *(d)* apparently petitioner objects to the fact that very similar waiver requests, phrased in very similar language, have been rejected by the Commission on very similar grounds, which have also been phrased in very similar language. But it is clearly desirable that different parties making the same argument receive the same treatment; in any event, the critical consideration is that we have examined the argument made and have ruled upon it; *(e)* this argument has not been supported. But even if it had been, it must be rejected as irrelevant to the considerations for requiring program exclusivity articulated in the *Second Report and Order; (f), (g), (i)* the short answer to these arguments is that we have provided for hearings where they appear justified – but petitioner's arguments have not persuaded us that a hearing is required in its case; and *(h)* no citation is furnished for this proposition. Nor did our action in *TelePrompTer Transmission of Kansas, Inc.,* 2 FCC 2d 312, modifying Examiner Schildhause's decision at 38 FCC 489, and the Review Board's decision at 38 FCC 477 have such effect.

In view of the foregoing, the Commission finds that its earlier action (FCC 67-208, 7 FCC 2d 120) was consistent with the public interest.

Accordingly, *It is ordered,* That the petition for reconsideration, filed March 23, 1967, by TelePrompTer of Liberal, Inc., directed against the Commission's cited action (FCC 67-208, 7 FCC 2d 120) *Is denied.*

Federal Communications Commission,
Ben F. Waple, *Secretary.*

Dissenting Statement of Commissioner Robert T. Bartley

In my opinion, the CATV rules are invalid and waivers are not necessary. However, assuming their validity, I would here grant full relief as requested by the CATV.

APPENDIX D

EXTRACT OF RECONSIDERATION OF SECOND REPORT AND ORDER

Docket 14895, *et al.*

MEMORANDUM OPINION AND ORDER

(Adopted January 5, 1967)

[Reprinted Here is Part I Only, Dealing With the First Amendment Questions Presented]

* * * * *

I

2. The contentions concerning the Commission's jurisdiction are essentially repetitive of arguments fully considered in our previous opinions.[2] We shall treat in greater detail the question of whether the rules are inconsistent with constitutional and statutory requirements of

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[2] The contentions concerning the validity of the "grandfathering" date of Feb. 15, 1966, our decision to make the rules effective upon publication in the Federal Register, our failure to hold a full evidentiary hearing before promulgating the rules, and the general adequacy of notice of rulemaking have all been discussed in the memorandum opinion and order, released May 27, 1966, denying petitions for stay of the effective date of the rules, FCC 66-456, 3 F.C.C. 2d 816. It is contended further that sufficient notice was not given that "final" rules, rather than "interim" action pending a resolution of pt. II of the rulemaking, would be adopted for CATV operations in major markets. While the *Second Report* dealt only with pt. I and pars. 49 and 50, we examined the comments on pt. II and concluded that they added very little to the comments on pars. 49 and 50, certainly nothing which

(Continued)

free speech. See, e.g., *Back Mountain Telecable, Inc.*, 5 F.C.C. 2d 735. Such inconsistency is urged on the ground that they interfere with the right to receive programs and direct the conduct of CATVs in deciding what programs shall and shall not be carried. Assuming that the provisions of section 326 of the Communications Act, 47 U.S.C. 326, are applicable to CATVs, we see no violation of either the first amendment or that statutory provision.

3. It is well established that reasonable regulation of radio transmissions, if consistent with the public interest as that term is defined taking into account the overall purposes and provisions of the act, is not violative of the right of free speech. *National Broadcasting Co. v. United States,* 319 U. S. 190 (1943); *Lafayette Radio Electronics Corp. v. United States,* 345 F.2d 278 (C.A. 2, 1965). This principle has been applied to the imposition of carriage and nonduplication restrictions on CATVs similar to those finally adopted in the *Second Report and Order. Carter Mountain Transmission Corp. v. Federal Communications Commission,* 116 U. S. App. D. C. 93, 321 F.2d 359 (1963), cert. deh. 375 U. S. 951; *Idaho Microwave, Inc. v. Federal Communications Commission,* 122 U. S. App. D. C. 253, 352 F.2d 729 (1965).

4. While it is true that those cases dealt with radio licensing, we have now held that CATVs provide an extension of a broadcast service; see also *Clarksburg Publishing Co. v. Federal Communications Commission,* 96 U. S. App. D. C. 211, 217, 225 F.2d 511, 517 (1955).

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[2] (Continued)

would permit us to adopt substantive rules resolving the policy issues in this area. We decided that evidentiary hearings were necessary and our major market procedure operates pending a resolution of the issues by this process rather than by the rulemaking process.

If, as we believe, Congress has given us the regulatory authority we have asserted, there is no reason why the free speech principles should apply differently to those CATVs which derive their signals off-the-air than to those which use licensed radio.[3] The public-interest considerations remain the same, as does the impact upon speech. We are not concerned here with the sort of "sweeping suppression of home subscription television" which was stricken down on free speech grounds in *Weaver v. Jordan,* 49 Cal. Reptr. 537, 411 P.2d 289 (1966), but rather with limited regulation.

5. So far as our rules go beyond the original carriage and nonduplication requirements to prohibit extending certain signals beyond their grade B contour without a hearing, it can hardly be contended, in light of the existing authorities, that the right of free speech includes the right of a party subject to the act's jurisdiction (here an interstate communicator by wire) to extend the service area of a television station beyond the area authorized by the Commission, in a manner inconsistent with the public interest. Thus, the CATV system has no more constitutional right to extend the service area of a station in a manner inconsistent with the public interest than the station would have the constitutional right to increase its height and power in violation of our rules or the public interest. *National Broadcasting Co. v. United States,* 319 U. S. 190 (1943); see sections 303(h) and 307(b) of the act.

6. One other contention on the question of the Commission's authority warrants brief discussion.[4] It is urged

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[3] See also *United Artists Television, Inc. v. Fortnightly Corp.,* 255 F. Supp. 177 (S.D.N.Y., decided May 23, 1966), explaining in detail why CATVs are not merely reception facilities and that they do transmit radio waves, albeit by wire.

[4] We think no more than mention need be made of the contention that the rules deprive parties holding local franchies of property

(Continued)

that the Commission cannot rely upon any of the radio licensing provisions of title III of the act, on the theory that they do not apply to wire transmissions but only authorize regulation of radio and television stations licensed under title III. This approach parallels the argument made, and rejected, in *Carter Mountain, supra,* that the Commission was applying "broadcast regulation" to common carriers.

7. The Communications Act does not so compartmentalize the Commission's functions. On the contrary, it created one agency "for the purpose of regulating interstate and foreign commerce in communication by wire and radio" by centralizing authority heretofore granted by law to several agencies and by granting additional authority with respect to interstate and foreign commerce in wire and radio communications * * * " (sec. 1, 47 U.S.C. 151). When a new development constitutes an extension of radio or television service, as CATV does, it is unrealistic to treat it as though it were totally unrelated.

8. Congress " * * * did not frustrate the purposes for which the Communications Act of 1934 was brought into being by attempting an itemized catalog of the specific manifestations of the general problems for the solution of which it was establishing a regulatory agency. That would have stereotyped the powers of the

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[4] (Continued)

without compensation. Federal regulation of businesses engaged in interstate commerce is not subject to attack on that ground. *Nelson Brothers Bond & Mortgage Co. v. Federal Radio Commission,* 289 U. S. 266, 282. The contention that systems in operation prior to the issuance of the notice of proposed rulemaking have a constitutional right to be "grandfathered" is also patently without merit. Rules adopted after full rulemaking procedures may validly be applied to existing systems. We have, however, repeatedly indicated our intention to avoid undue disruption to the public in this connection.

Commission to specific details in regulating a field of enterprise the dominant characteristic of which was the rapid pace of its unfolding. And so Congress did what experience had taught it in similar attempts at regulation, even in fields where the subject matter of regulation was far less fluid and dynamic than radio. The essence of that experience was to define broad areas for regulation and to establish standards for judgment adequately related in their application to the problems to be solved." *National Broadcasting Co. v. United States,* 319 U. S. 190, 219-220. We cannot adopt a view of the act which would frustrate both the congressional intent and the more effective use of radio in the public interest.

* * * * *

APPENDIX E

ARTICLES IN ADDITION TO, AND AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA, PROPOSED BY CONGRESS, AND RATIFIED BY THE LEGISLATURES OF THE SEVERAL STATES PURSUANT TO THE FIFTH ARTICLE OF THE ORIGINAL CONSTITUTION

ARTICLE [I]

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

ARTICLE [V]

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

ADMINISTRATIVE PROCEDURE ACT
5 U.S.C.

§ 554. Adjudications

(a) This section applies, according to the provisions thereof, in every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing, except to the extent that there is involved –

(1) a matter subject to a subsequent trial of the law and the facts de novo in a court;

(2) the selection or tenure of an employee, except a hearing examiner appointed under section 3105 of this title;

(3) proceedings in which decisions rest solely on inspections, tests, or elections;

(4) the conduct of military or foreign affairs functions;

(5) cases in which an agency is acting as an agent for a court; or

(6) the certification of worker representatives.

(b) Persons entitled to notice of an agency hearing shall be timely informed of –

(1) the time, place, and nature of the hearing;

(2) the legal authority and jurisdiction under which the hearing is to be held; and

(3) the matters of fact and law asserted.

When private persons are the moving parties, other parties to the proceeding shall give prompt notice of issues controverted in fact or law; and in other instances agencies may by rule require responsive pleading. In fixing the time and place for hearings, due regard shall be had for the convenience and necessity of the parties or their representatives.

(c) The agency shall give all interested parties opportunity for –

(1) the submission and consideration of facts, arguments, offers of settlement, or proposals of adjustment when time, the nature of the proceeding, and the public interest permit; and

(2) to the extent that the parties are unable so to determine a controversy by consent, hearing and decision on notice and in accordance with sections 556 and 557 of this title.

(d) The employee who presides at the reception of evidence pursuant to section 556 of this title shall make

the recommended decision or initial decision required by section 557 of this title, unless he becomes unavailable to the agency. Except to the extent required for the disposition of ex parte matters as authorized by law, such an employee may not –

(1) consult a person or party on a fact in issue, unless on notice and opportunity for all parties to participate; or

(2) be responsible to or subject to the supervision or direction of an employee or agent engaged in the performance of investigative or prosecuting functions for an agency.

An employee or agent engaged in the performance of investigative or prosecuting functions for an agency in a case may not, in that or a factually related case, participate or advise in the decision, recommended decision, or agency review pursuant to section 557 of this title, except as witness or counsel in public proceedings. This subsection does not apply –

(A) in determining applications for initial licenses;

(B) to proceedings involving the validity or application of rates, facilities, or practices of public utilities or carriers; or

(C) to the agency or a member or members of the body comprising the agency.

(e) The agency, with like effect as in the case of other orders, and in its sound discretion, may issue a declaratory order to terminate a controversy or remove uncertainty.

COMMUNICATIONS ACT OF 1934
47 U.S.C. §§

ACTION UPON APPLICATIONS; FORM OF AND CONDITIONS ATTACHED TO LICENSES

Sec. 309. (a) Subject to the provisions of this section, the Commission shall determine, in the case of each

application filed with it to which section 308 applies, whether the public interest, convenience, and necessity will be served by the granting of such application, and, if the Commission, upon examination of such application and upon consideration of such other matters as the Commission may officially notice, shall find that public interest, convenience, and necessity would be served by the granting thereof, it shall grant such application.

* * *

(e) If, in the case of any application to which subsection (a) of this section applies, a substantial and material question of fact is presented or the Commission for any reason is unable to make the finding specified in such subsection, it shall formally designate the application for hearing on the ground or reasons then obtaining and shall forthwith notify the applicant and all other known parties in interest of such action and the grounds and reasons therefor, specifying with particularity the matters and things in issue but not including issues or requirements phrased generally. When the Commission has so designated an application for hearing, the parties in interest, if any, who are not notified by the Commission of such action may acquire the status of a party to the proceeding thereon by filing a petition for intervention showing the basis for their interest not more than thirty days after publication of the hearing issues or any substantial amendment thereto in the Federal Register. Any hearing subsequently held upon such application shall be a full hearing in which the applicant and all other parties in interest shall be permitted to participate. The burden of proceeding with the introduction of evidence and the burden of proof shall be upon the applicant, except that with respect to any issue presented by a petition to deny or a petition to enlarge the issues, such burdens shall be as determined by the Commission.

ADMINISTRATIVE SANCTIONS

Sec. 312. (a) The Commission may revoke any station license or construction permit —

(1) for false statements knowingly made either in the application or in any statement of fact which may be required pursuant to section 308;

(2) because of conditions coming to the attention of the Commission which would warrant it in refusing to grant a license or permit on an original application;

(3) for willful or repeated failure to operate substantially as set forth in the license;

(4) for willful or repeated violation of, or willful or repeated failure to observe any provision of this Act or any rule or regulation of the Commission authorized by this Act or by a treaty ratified by the United States;

(5) for violation of or failure to observe any final cease and desist order issued by the Commission under this section; or

(6) for violation of section 1304, 1343, or 1464 of title 18 of the United States Code.

(b) Where any person (1) has failed to operate substantially as set forth in a license, (2) has violated or failed to observe any of the provisions of this Act, or section 1304, 1343, or 1464 of title 18 of the United States Code, or (3) has violated or failed to observe any rule or regulation of the Commission authorized by this Act or by a treaty ratified by the United States, the Commission may order such person to cease and desist from such action.

(c) Before revoking a license or permit pursuant to subsection (a), or issuing a cease and desist order pursuant to subsection (b), the Commission shall serve upon the licensee, permittee, or person involved an order to show cause why an order of revocation or a cease and desist order should not be issued. Any such order to show cause shall contain a statement of the matters with respect to which the Commission is inquiring and shall call upon said licensee, permittee, or person to appear before the Commission at a time and place stated in the order, but in no event less than

thirty days after the receipt of such order, and give evidence upon the matter specified therein; except that where safety of life or property is involved, the Commission may provide in the order for a shorter period. If after hearing, or a waiver thereof, the Commission determines that an order of revocation or a cease and desist order should issue, it shall issue such order, which shall include a statement of the findings of the Commission and the grounds and reasons therefor and specify the effective date of the order, and shall cause the same to be served on said licensee, permittee, or person.

(d) In any case where a hearing is conducted pursuant to the provisions of this section, both the burden of proceeding with the introduction of evidence and the burden of proof shall be upon the Commission.

(e) The provisions of section 9(b) of the Administrative Procedure Act which apply with respect to the institution of any proceeding for the revocation of a license or permit shall apply also with respect to the institution, under this section, of any proceeding for the issuance of a cease and desist order.

APPLICATION OF ANTITRUST LAWS; REFUSAL OF LICENSES AND PERMITS IN CERTAIN CASES

Sec. 313. (a) All laws of the United States relating to unlawful restraints and monopolies and to combinations, contracts, or agreements in restraint of trade are hereby declared to be applicable to the manufacture and sale of and to trade in radio apparatus and devices entering into or affecting interstate or foreign commerce and to interstate or foreign radio communications. Whenever in any suit, action, or proceeding, civil or criminal, brought under the provisions of any of said laws or in any proceedings brought to enforce or to review findings and orders of the Federal Trade Commission or other governmental agency in respect of any matters as to which said Commission or other governmental agency is by law authorized to act, any licensee shall be found guilty of the violation of the

provisions of such laws or any of them, the court, in addition to the penalties imposed by said laws, may adjudge, order, and/or decree that the license of such licensee shall, as of the date the decree or judgment becomes finally effective or as of such other date as the said decree shall fix, be revoked and that all rights under such license shall thereupon cease: *Provided, however,* That such licensee shall have the same right of appeal or review, as is provided by law in respect of other decrees and judgments of said court.

(b) The Commission is hereby directed to refuse a station license and/or the permit hereinafter required for the construction of a station to any person (or to any person directly or indirectly controlled by such person) whose license has been revoked by a court under this section.

PRESERVATION OF COMPETITION IN COMMERCE

Sec. 314. After the effective date of this Act no person engaged directly, or indirectly through any person directly or indirectly controlling or controlled by, or under direct or indirect common control with, such person, or through an agent, or otherwise, in the business of transmitting and/or receiving for hire energy, communications, or signals by radio in accordance with the terms of the license issued under this Act, shall by purchase, lease, construction, or otherwise, directly or indirectly, acquire, own, control, or operate any cable or wire telegraph or telephone line or system between any place in any State, Territory, or possession of the United States or in the District of Columbia, and any place in any foreign country, or shall acquire, own, or control any part of the stock or other capital share or any interest in the physical property and/or other assets of any such cable, wire, telegraph, or telephone line or system, if in either case the purpose is and/or the effect thereof may be to substantially lessen competition or to restrain commerce between any place in any State, Territory, or possession of the United States, or in the District of Columbia, and any place in any foreign country, or unlawfully to create monopoly in any line of commerce; nor shall any person engaged directly, or indirectly through any person

directly or indirectly controlling or controlled by, or under direct or indirect common control with, such person, or through an agent, or otherwise, in the business of transmitting and/or receiving for hire messages by any cable, wire, telegraph, or telephone line or system (a) between any place in any State, Territory, or possession of the United States, or in the District of Columbia, and any place in any other State, Territory, or possession of the United States; or (b) between any place in any State, Territory, or possession of the United States, or the District of Columbia, and any place in any foreign country, by purchase, lease, construction, or otherwise, directly or indirectly acquire, own, control, or operate any station or the apparatus therein, or any system for transmitting and/or receiving radio communications or signals between any place in any State, Territory, or possession of the United States, or in the District of Columbia, and any place in any foreign country, or shall acquire, own, or control any part of the stock or other capital share of any interest in the physical property and/or other assets of any such radio station, apparatus, or system, if in either case, the purpose is and/or the effect thereof may be to substantially lessen competition or to restrain commerce between any place in any State, Territory, or possession of the United States, or in the District of Columbia, and any place in any foreign country, or unlawfully to create monopoly in any line of commerce.

MODIFICATION BY COMMISSION OF CONSTRUCTION PERMITS OR LICENSES

Sec. 316. (a) Any station license or construction permit may be modified by the Commission either for a limited time or for the duration of the term thereof, if in the judgment of the Commission such action will promote the public interest, convenience, and necessity, or the provisions of this Act of any treaty ratified by the United States will be more fully complied with. No such order of modification shall become final until the holder of the license or permit shall have been notified in writing of the proposed action

and the grounds and reasons therefor, and shall have been given reasonable opportunity, in no event less than thirty days, to show cause by public hearing, if requested, why such order of modification should not issue: *Provided,* That where safety of life or property is involved, the Commission may by order provide for a shorter period of notice.

(b) In any case where a hearing is conducted pursuant to the provisions of this section, both the burden of proceeding with the introduction of evidence and the burden of proof shall be upon the Commission.

CENSORSHIP; INDECENT LANGUAGE

Sec. 326. Nothing in this Act shall be understood or construed to give the Commission the power of censorship over the radio communications or signals transmitted by any radio station, and no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communication.

F.C.C. RULES AND REGULATIONS
47 C.F.R. §§

§ 74.1103 Requirement relating to distribution of television signals by community antenna television systems.

* * *

(e) *Stations entitled to program exclusivity.* Any such system which operates, in whole or in part, within the Grade B or higher priority contour of any commercial or noncommercial educational television station or within the community of a fourth priority television translator station, and which carries the signal of such station shall, upon request of the station licensee or permittee, maintain the station's exclusivity as a program outlet against lower priority or more distant duplicating signals, but not against signals

of equal priority, in the manner and to the extent specified in paragraphs (f) and (g) of this section.

(f) *Program exclusivity; extent of protection.* Where a station is entitled to program exclusivity, the CATV system shall, upon the request of the station licensee or permittee, refrain from duplicating any program broadcast by such station, on the same day as its broadccast by the station, if the CATV operator has received notification from the requesting station of the date and time of its broadcast of the program and the date and time of any broadcast to be deleted, as soon as possible and in any event no later than 48 hours prior to the broadcast to be deleted. Upon request of the CATV system, such notice shall be given at least 8 days prior to the date of any broadcast to be deleted.

(g) *Exceptions.* Notwithstanding the requirements of paragraph (f) of this section.

(1) The CATV system need not delete reception of a network program if, in so doing, it would leave available for reception by subscribers, at any time, less than the programs of two networks (including those broadcast by any stations whose signals are being carried and whose program exclusivity is being protected pursuant to the requirements of this section);

(2) The system need not delete reception of a network program which is scheduled by the network between the hours of 6 and 11 p.m., eastern time, but is broadcast by the station requesting deletion, in whole or in part, outside of the period which would normally be considered prime time for network programming in the time zone involved;

(3) The system need not delete reception of any program consisting of the broadcast coverage of a speech or other event as to which the time of presentation is of special significance, except where the program is being simultaneously broadcast by a station entitled to program exclusivity; and

(4) The system need not delete reception of any program which would be carried on the system in color but will be broadcast in black and white by the station requesting deletion.

§ 74.1109 Procedures applicable to petitions for waiver of the rules, additional or different requirements and rulings on complaints or disputes.

(a) Upon petition by a CATV system, an applicant, permittee, or licensee of a television broadcast, translator, or microwave relay station, or by any other interested person, the Commission may waive any provision of the rules relating to the distribution of television broadcast signals by CATV systems, impose additional or different requirements, or issue a ruling on a complaint or disputed question.

* * *

(f) The Commission, after consideration of the pleadings, may determine whether the public interest would be served by the grant, in whole or in part, or denial of the request, or may issue a ruling on the complaint or dispute. The Commission may specify other procedures, such as oral argument, evidentiary hearing, or further written submissions directed to particular aspects, as it deems appropriate. In the event that an evidentiary hearing is required, the Commission will determine, on the basis of the pleadings and such other procedures as it may specify, whether temporary relief should be accorded to any party pending the hearing and the nature of any such temporary relief. Where a petition involves new service to subscribers (other than service coming within the provisions of § 74.1107(a) of this chapter), the Commission will expedite its consideration and promptly issue a ruling either on the merits of the petition or on the interlocutory question of temporary relief pending further procedures.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

Office-Supreme Court, U.S.
FILED
AUG 19 1968
JOHN F. DAVIS, CLERK

No. 311

CONLEY ELECTRONICS CORPORATION
d/b/a TELEPROMPTER OF LIBERAL, INC.

Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION
AND UNITED STATES OF AMERICA,

Respondents.

JOINT OPPOSITION OF KAKE–TV AND RADIO, INC., AND SOUTHWEST KANSAS TELEVISION CO., INC., TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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KAKE–TV and Radio, Inc. (hereinafter "KAKE–TV") and Southwest Kansas Television Co., Inc. (hereinafter "Southwest"), hereby oppose the Petition for Writ of Certiorari filed in this matter by Conley Electronics Corporation. As will appear hereinbelow, KAKE–TV and Southwest adopt in its entirety and fully support the Opposition to the said Petition for Writ of Certiorari filed herein on behalf of the Respondents, Federal Communications Commission and United States of America.

Pursuant to Orders of the United States Court of Appeals for the Tenth Circuit, KAKE–TV and Southwest participated as Intervenors in the proceedings below. KAKE–TV and Southwest were proponents of the memorandum opinion and orders of the Federal Communications Commission as to which Petitioner here, Conley Electronics Corporation, sought review in the Court below and both urged affirmation of such orders in said review proceedings. Both KAKE–TV and Southwest would be aggrieved should this Court grant the relief sought by Petitioner. In light of the foregoing, and pursuant to Rule 21 of this Court, both are entitled to participate herein as parties Respondent.

KAKE–TV and Southwest are apprised of the contents of the brief filed herein by the Respondents, Federal Communications Commission and United States of America, in opposition to the Petition of Conley Electronics Corporation. It is the judgment of KAKE–TV and Southwest that said opposition brief fully and correctly presents the factual and legal considerations material to a disposition of the matter and that said brief fully represents the position of KAKE–TV and Southwest with respect to the Petition for Writ of Certiorari.

In light of the multiple parties involved in this proceeding and in the interest of lessening the Court's procedural burden, KAKE–TV and Southwest deem it appropriate to forego their right to file separate briefs and, in lieu of such briefs, they hereby fully support and adopt in its entirety the brief filed herein by the

Respondents, Federal Communications Commission and the United States of America.

Respectfully submitted,

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

GORDON ELECTRONICS CORPORATION d/b/a
TELEMONITOR OF LIBERAL, INC., PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION
AND UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE FEDERAL COMMUNICATIONS COMMISSION IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 311

CONLEY ELECTRONICS CORPORATION d/b/a TELEPROMPTER OF LIBERAL, INC., PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE FEDERAL COMMUNICATIONS COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 21-32) is not yet reported. The memorandum opinions and orders of the Federal Communications Commission (R. 46-49, 130-133) are reported at 7 F.C.C. 2d 120 and 8 F.C.C. 2d 473.

JURISDICTION

The judgment of the court of appeals affirming the decision of the Commission was entered on April 22, 1968. The petition for a writ of certiorari was filed on July 19, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the Federal Communications Commission's rule prohibiting CATV systems, on request of a local station licensee, from duplicating on the same day any program broadcast by such licensee is a violation of the free speech guarantee of the First Amendment.

2. Whether, in the circumstances of the instant case, the Commission was required to hold an evidentiary hearing on petitioner's request for waiver of the general non-duplication rule.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent provisions of the Constitution, the Administrative Procedure Act, 5 U.S.C. 554, the Communications Act of 1934, as amended, 47 U.S.C. 151 *et seq.*, and of the rules of the Federal Communications Commission, 47 C.F.R. 74.1103 and 74.1109, are set forth in the Appendix to the petition (Pet. App. 46-56), and in the Appendix, *infra*, pp. 13-14.

STATEMENT

In 1966 the Federal Communications Commission asserted jurisdiction over all community antenna

television (CATV) systems, and adopted regulations designed to accommodate the interests of both the rapidly expanding CATV industry and local television broadcast stations. Second Report and Order, 2 F.C.C. 2d 725. Late last Term, in *United States* v. *Southwestern Cable Co.*, Nos. 363 and 428, 1967 Term, decided June 10, 1968, this Court unanimously upheld the Commission's assertion of jurisdiction to regulate CATV systems in the public interest. Among other things, the newly promulgated rules carried forward, with some revision, certain measures governing the carriage of local signals and the non-duplication of the programming of local stations which had previously been applied to CATV systems served by microwave radio facilities. First Report and Order, 38 F.C.C. 683; *United States* v. *Southwestern Cable Co.*, *supra*, slip. op., p. 8.

Essentially, the Commission found that the impact of CATV on local stations could, if unchecked, disrupt and seriously impair the nationwide system for the allocation of television channels. Recognizing that CATV performed a valuable supplemental service, the Commission concluded that the potentially adverse impact of such systems on local television stations would be "ameliorated" if the systems were required to carry the programs broadcast by the local station and were not allowed to duplicate those programs on the same day by carrying more distant stations providing the same programs. In the Commission's considered view, these provisions would "create reasonably fair and open conditions for competition between CATV and broadcasting stations as alternative ways

of making television programs available to the public" (38 F.C.C. at 713).[1]

Conley Electronics Corp. is the operator of a CATV system in Liberal, Kansas. It carries the signals of three local stations, and, through the use of microwave facilities licensed to a sister corporation, Teleprompter Transmission of Kansas, Inc.,[2] imports three television signals from Amarillo, Texas, some 140 miles distant. The non-duplication rule, contained in 47 C.F.R. 74.1103, requires that petitioner delete those programs from the Amarillo stations which duplicate the programs shown by the local Kansas stations if they are broadcast on the same day.[3] Con-

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[1] The non-duplication protection applies to "prime time" network programs (*i.e.*, those presented by the networks between 6 p.m. and 11 p.m.) only if such programs are presented by the local station entirely within what is locally considered to be "prime time." Furthermore, a local station is only entitled to non-duplication protection on a CATV system "against lower priority or more distant duplicating signals, but not against signals of equal priority * * *" (47 C.F.R. 74.1103(e)). Finally, the CATV system need not delete carriage of a network program if, in doing so, it would leave available for reception of subscribers, at any time, the programs of less than two networks, or would deprive them of color reception of the program (47 C.F.R. 74.1103(g)).

[2] Teleprompter Transmission of Kansas, Inc., is a microwave common carrier serving petitioner. Its microwave system relays the signals of the Amarillo stations to a point where they are received and retransmitted by petitioner to its subscribers. Under the Commission's rules Teleprompter Transmission of Kansas, Inc., must include a recitation of the carriage and non-duplication rules in the tariff it files with the Commission.

[3] This does not result in any loss in viewing to the subscriber since the same program emanating from one of the nearby Kansas stations is carried by petitioner's system.

ley and its associated microwave carrier sought a waiver of the non-duplication rule, as provided for by 47 C.F.R. 74.1109, so as to permit the system to continue to carry the Amarillo signals (R. 1-22). That request was based upon the grounds, *inter alia*, that there was no showing of adverse impact on the local Kansas stations, that complying with the rule might have an adverse financial effect upon petitioner's system and might lead to a disruption of service, and that the rule should not in any event be applied without first holding a hearing.

Following the submission of pleadings, the Commission, finding it unnecessary to conduct an evidentiary hearing, denied the request for a waiver (Pet. App. 33-36; R. 46-49), and also subsequently denied a petition for reconsideration (Pet. App. 37-40; R. 130-133). It stated that the reasons for applying the non-duplication rule without a specific showing of adverse economic impact on the local station had been carefully explained in the First Report and Order, 38 F.C.C. at 713-714, and that Conley had supplied no factual support for its allegation of disastrous financial impact or potential disruption of service. The Commission also rejected petitioner's general challenge to the Commission's authority to issue the rules, and, finally, concluded that no facts had been presented to it which demonstrated the necessity for an evidentiary hearing.

The court of appeals sustained the Commission's ruling (Pet. App. 21-32). It rejected petitioner's First Amendment claim on the ground that it had not been presented to the Commission and therefore

"comes too late" (*id.* at 27). It noted, moreover, that the free speech argument was "without merit" since the non-duplication rule involves "reasonable regulation in the public interest" *(ibid.)*. Turning to the Commission's denial without hearing of petitioner's request for a waiver of the non-duplication rule, the court below concluded that "when rules of general application are promulgated in a valid rule-making proceeding, as was done here, they may be generally applied by the Commission without individual adjudicatory hearings unless a party, claiming to be aggrieved, sets forth reasons why the public interest would be served by an individualized waiver of the rule" (*id.* at 30). Since petitioner had not stated any reasons which would require the Commission to grant a waiver, the court determined, no hearing was required and no violation of due process resulted from the Commission's denial thereof.[4]

ARGUMENT

The decision of the court below is in accord with those in other circuits and is clearly correct. Neither of the questions presented is sufficiently novel or important to warrant further review.

1. There is no merit to the claim that the non-duplication rule violates petitioner's rights under the First Amendment. Initially, as the court below cor-

[4] In addition, the court below determined that the non-duplication rule, adopted as an integral part of the Commission's assertion of jurisdiction over CATV generally, was a valid exercise of the Commission's authority (Pet. App. 26), a holding which is completely in accord with this Court's subsequent decision in *Southwestern Cable.*

rectly held, the argument was not timely because it was not raised before the Commission.[5] Arguments not presented to the Commission initially cannot be raised subsequently on judicial review. 47 U.S.C. 405; *Unemployment Compensation Commission of Alaska* v. *Aragon*, 329 U.S. 143; *United States* v. *Tucker Truck Lines*, 344 U.S. 33; *Presque Isle TV Co., Inc.* v. *Federal Communications Commission*, 387 F.2d 502 (C.A. 1). In any event, the Commission's rule is a valid exercise of its authority under the public interest standard of the Communications Act and as such does not contravene the First Amendment. See *National Broadcasting Co.* v. *United States*, 319 U.S. 190, 226-227.[6]

In affirming the Commission's jurisdiction over CATV systems, this Court concluded in *Southwestern Cable* that the Commission may issue "such rules * * * and prescribe such restrictions and conditions"

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[5] Petitioner suggests (Pet. 7) that the court of appeals erred on this point since the argument was raised below, citing R. 3 of the proceedings before the Commission. We find no reference to the First Amendment there, but only a general inclusion by reference to an entire adjudicatory proceeding which had been concluded prior to the initiation of the instant request for a waiver of the non-duplication rule.

[6] During the extensive rulemaking proceeding which culminated in the Commission's assumption of jurisdiction over all CATV systems and the promulgation of its rules and regulations in this regard, thorough consideration was given by the agency to the free speech issues which were allegedly raised by its proposed action. Indeed, in rejecting the view that the restrictions on CATV service which it prescribed impinged on the First Amendment, the Commission relied on the same authorities invoked here by the court below (see Reconsideration of Second Report and Order, 6 F.C.C. 2d 309, 310-312, set out at Pet. App. 41-43).

as are reasonably ancillary and necessary to the effective performance of its responsibilities with respect to the regulation of television broadcasting (slip op., p. 20).[7] One of the regulations adopted by the Commission is section 74.1103(e), the non-duplication rule at issue here. Under that rule CATV subscribers may receive as wide a range of programming as the physical facilities of the system permit, but where the same program is broadcast on the same day by both a local and a distant station, the system may distribute only the signal of the local station. The purpose of the rule is to guard against the disruptive impact on the nationwide system of channel allocations[8] which CATV might otherwise have had by importing distant signals which duplicate those of local stations, thereby fragmenting their audiences and threatening their viability. Cf. *Southwestern Cable*, *supra*, slip op., pp. 17-18. Plainly, such a rule is "reasonably ancillary" to the Commission's statutory responsibilities. See, *e.g.*, 47 U.S.C. 151, 303(g), 303(h), 307(b).

The holding of the court below that the non-duplication requirement is consistent with the First Amendment accords with other cases in which the question

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[7] We of course recognize that the Court in *Southwestern* noted that "questions as to the validity of the specific rules promulgated by the Commission for the regulation of CATV are not now before the Court" (slip op., p. 9). It is our submission, however, that, given the Commission's authority over CATV systems generally, which *Southwestern* definitively established, the particular rule here challenged is clearly a reasonable facet of the implementation of that jurisdiction.

[8] See *Logansport Broadcasting Corp.* v. *Federal Communications Commission*, 210 F.2d 24 (C.A.D.C.).

has been considered. In *Carter Mountain Transmission Corp.* v. *Federal Communications Commission*, 321 F.2d 359 (C.A.D.C.), certiorari denied, 375 U.S. 951, a non-duplication requirement imposed on an *ad hoc* basis prior to adoption of the present rule was found to be a "legitimate measure of protection for the local station and the public interest" and therefore not in violation of the First Amendment (321 F.2d at 364). See also *Buckeye Cablevision, Inc.* v. *Federal Communications Commission*, 387 F.2d 220 (C.A.D.C.); *Idaho Microwave, Inc.* v. *Federal Communications Commission*, 352 F.2d 729 (C.A.D.C.).[9]

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[9] Petitioner argues (Pet. 10-11) that each of these cases was concerned with broadcast licensing rather than regulation of unlicensed CATV systems. However, there is no dispute that petitioner relies on the licensed microwave facilities of its sister corporation to import the Amarillo signals; and while the microwave common carrier which served petitioner did not pursue its remedies in the court of appeals, it did join petitioner before the Commission. In any event, it is undeniable that CATV systems provide an extension of a broadcast service, and there is no reason why the free speech principles outlined above should apply differently to those systems which receive their signals off the air than to those using licensed radio. See Reconsideration of Second Report and Order, 6 F.C.C. 2d 309, 310. The public interest questions, as well as the alleged impact on free speech, are the same in both cases. Moreover, we note that the Eighth Circuit, in *Black Hills Video Corp.* v. *Federal Communications Commission*, Nos. 18,052 *et al.*, decided August 7, 1968, rejected the contention that the Commission's CATV rules violated the First Amendment, reasoning that "[t]he Commission's effort to preserve local television by regulating CATVs has the same constitutional status under the First Amendment as regulation of the transmission of signals by the originating television stations." Cf. *Federal Power Commission* v. *Transcontinental Gas Pipe Line Corp.*, 365 U.S. 1, holding that jur-

Finally, petitioner's reliance (Pet. 13) on this Court's decision in *Fortnightly Corp.* v. *United Artists Television, Inc.*, No. 618, 1967 Term, decided June 17, 1968, is misplaced. That case held that CATV carriage of television signals did not result in copyright infringement. Since the Commission's reference to "unfair competition" in the Second Report and Order (2 F.C.C. 2d at 778) obviously related to the fact that CATV systems, unlike the local stations, had not traditionally paid for the programming they provide, and since the effect of the *Fortnightly* decision is to maintain that situation, that holding perpetuates and indeed enhances the significance of this consideration. Thus, *Fortnightly* works no change in the assumptions on which the Commission's rules were premised, but rather confirms the propriety of the Commission's recognition of the significantly different situations of CATV systems and local stations as regards access to programming.

2. There is no merit to petitioner's contention that the Commission acted improperly in denying its request for a waiver of the non-duplication rule without first having held an evidentiary hearing (Pet. 14-17). It is well established that administrative agencies have authority to adopt and apply general rules applicable to a broad class of persons without conducting separate adjudicatory proceedings for each person affected, even where the regulatory statute requires a

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isdiction over a distribution process may reach to the end use even if that use is not specifically encompassed within the jurisdictional grant.

hearing before individual licenses or certificates may be modified. *Federal Power Commission* v. *Texaco*, 377 U.S. 33; *WBEN, Inc., et al.* v. *United States*, 13 Pike & Fischer R.R. 2d 2001 (C.A. 2), petitions for certiorari pending, Nos. 368, 369, 390, this Term; *American Airlines* v. *Civil Aeronautics Board*, 359 F.2d 624 (C.A.D.C.), certiorari denied, 385 U.S. 843; *California Citizens Band Association, Inc.* v. *United States*, 375 F.2d 43 (C.A. 9), certiorari denied, 389 U.S. 844. The fact that the rules require a modification of existing business practices is not significant. Almost all substantive rules adopted by regulatory bodies have that effect. See, *e.g.*, *National Broadcasting Co.* v. *United States*, 319 U.S. 190; *Metropolitan Television Co.* v. *Federal Communications Commission*, 289 F.2d 874 (C.A.D.C.); cf. *Permian Basin Area Rate Cases*, 390 U.S. 747.

In this respect, petitioner is in a position analogous to that of the respondent in *United States* v. *Storer Broadcasting Co.*, 351 U.S. 192. The continued operation of its system is in violation of a duly adopted rule, and therefore, in requesting an exemption petitioner was obliged "to set forth reasons, sufficient, if true, to justify a change or waiver of the Rules" (351 U.S. at 205). Here the court below properly applied the *Storer* test and found that no reasons were set forth in the waiver request that would warrant an evidentiary hearing (Pet. App. 30). Thus, no denial of due process resulted (see *id.* at 30-32).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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AUGUST 1968.

APPENDIX

Pertinent provisions of the Communications Act of 1934, as amended, 47 U.S.C. 151 *et seq.*, in addition to those set out in the Appendix to the petition, provide as follows:

§ 151. For the purpose of regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States a rapid, efficient, nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges, for the purpose of the national defense, for the purpose of promoting safety of life and property through the use of wire and radio communication, and for the purpose of securing a more effective execution of this policy by centralizing authority heretofore granted by law to several agencies and by granting additional authority with respect to interstate and foreign commerce in wire and radio communication, there is created a commission to be known as the "Federal Communications Commission", which shall be constituted as hereinafter provided, and which shall execute and enforce the provisions of this chapter.

* * * *

§ 303. Except as otherwise provided in this chapter, the Commission from time to time, as public convenience, interest, or necessity requires shall—

* * * *

(g) Study new uses for radio, provide for experimental uses of frequencies, and generally encourage the larger and more effective use of radio in the public interest;

(h) Have authority to establish areas or zones to be served by any station.

* * * *

§ 307. * * *

(b) In considering applications for licenses, and modifications and renewals thereof, when and insofar as there is demand for the same, the Commission shall make such distribution of licenses, frequencies, hours of operation, and of power among the several States and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same.

* * * *

§ 405. After an order, decision, report, or action has been made or taken in any proceeding by the Commission, or by any designated authority within the Commission pursuant to a delegation under section 155(d)(1) of this title, any party thereto, or any other person aggrieved or whose interests are adversely affected thereby, may petition for rehearing only to the authority making or taking the order, decision, report, or action; and it shall be lawful for such authority, whether it be the Commission or other authority designated under section 155(d)(1) of this title, in its discretion, to grant such a rehearing if sufficient reason therefor be made to appear. A petion for rehearing must be filed within thirty days from the date upon which public notice is given of the order, decision, report, or action complained of. No such application shall excuse any person from complying with or obeying any order, decision, report, or action of the Commission, or operate in any manner to stay or postpone the enforcement thereof, without the special

order of the Commission. The filing of a petition for rehearing shall not be a condition precedent to judicial review of any such order, decision, report, or action, except where the party seeking such review (1) was not a party to the proceedings resulting in such order, decision, report, or action, or (2) relies on questions of fact or law upon which the Commission, or designated authority within the Commission, has been afforded no opportunity to pass. The Commission, or designated authority within the Commission, shall enter an order, with a concise statement of the reasons therefor, denying a petition for rehearing or granting such petition, in whole or in part, and ordering such further proceedings as may be appropriate: *Provided*, That in any case where such petition relates to an instrument of authorization granted without a hearing, the Commission, or designated authority within the Commission, shall take such action within ninety days of the filing of such petition. Rehearings shall be governed by such general rules as the Commission may establish, except that no evidence other than newly discovered evidence, evidence which has become available only since the original taking of evidence, or evidence which the Commission or designated authority within the Commission believes should have been taken in the original proceeding shall be taken on any rehearing. The time within which a petition for review must be filed in a proceeding to which section 402(a) of this title applies, or within which an appeal must be taken under section 402 (b) of this title in any case, shall be computed from the date upon which public notice is given of orders disposing of all petitions for rehearing filed with the Commission in such proceeding or

case, but any order, decision, report, or action made or taken after such rehearing reversing, changing, or modifying the original order shall be subject to the same provisions with respect to rehearing as an original order.

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Respondent.

On Petition for a Writ of Certiorari to
The United States Court of Appeals
for the Tenth Circuit

BRIEF FOR PETITIONER IN REPLY TO OPPOSITION

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ARGUMENT IN REPLY

In opposition to this petition for certiorari and our assertion of infringement upon free speech, the Government responds that the issue was not properly raised before the Commission, and that in any case the Commission's regulation is reasonable and thus overcomes any constitutional impediments. As to the

first point, we have already anticipated and dealt with this in footnote 6, p. 7 of our Petition.[1] Concerning the second point, the Commission, in answer to First Amendment challenges to the non-duplication rule, both here and in its rule making,[2] has relied solely upon *NBC v. United States*, 319 U.S. 190 (1943). Likewise, four circuits reviewing the Commission's CATV rules have singularly relied upon the *NBC* case, without significant re-examination,[3] in validating the acknowledged restraint upon the free flow of broadcast programs. A recent Seventh Circuit Opinion in *Radio Television News Directors Association v. United States*, ____

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[1] Moreover, the Government in its Opposition does not seriously contend that such an issue would have been given more than cursory treatment; see Opposition, page 7, note 6. Furthermore, it is significant that the Tenth Circuit in its review treated the First Amendment question on the merits despite the alleged procedural defect.

[2] *Reconsideration of the Second Report and Order*, 6 FCC2d 309 at 310-311 (1967). [See Appendix D to Petition for Writ of Certiorari].

[3] *Buckeye Cablevision, Inc. v. Federal Communications Commission*, 387 F.2d 220, 225 (D.C. Cir., 1967); *Conley Electronics Corporation v. Federal Communications Commission*, 394 F.2d 620 (10th Cir., 1968) [officially reported subsequent to the filing of this Petition for Writ of Certiorari, wherein it appears as Appendix A]; *Wheeling Antenna Company v. Federal Communications Commission*, ____ F.2d ____, 12 Pike & Fischer RR2d 2018 (Fourth Circuit No. 11,649, February 28, 1968); and *Black Hills Video Corporation v. Federal Communications Commission*, ____ F.2d ____, 13 Pike & Fischer RR2d 2123 (Eighth Circuit No. 18,052, August 7, 1968). Except to the extent that these opinions may be construed to conflict with the Seventh Circuit opinion, discussed herein, there is no conflict among the circuits on the precise question at issue. However, First Amendment challenges to the non-duplication rule are currently pending in the Ninth Circuit in *Total Telecable, Inc. v. Federal Communications Commission* (No. 21,990) and *Great Falls Community TV Cable Co., Inc. v. Federal Communications Commission* (No. 22,393).

F.2d ____, 14 Pike & Fischer RR2d 2023 (Nos. 16369 and 16498-99, decided September 10, 1968), casts doubt upon the validity of this dogged reliance and invites a more critical examination of the scope of the *NBC* decision and the permissible extent of "reasonable regulation" which restricts the free exercise of constitutionally protected rights.

The Seventh Circuit decision overturns the Commission's "personal attack" regulations.[4] There, as here, the Commission defended challenges that its regulations infringe freedom of speech and press by relying upon *NBC v. United States*, 319 U.S. 190 (1943). As the Seventh Circuit makes clear, *NBC* is not *carte blanche* power to regulate when constitutional rights may be impinged. The Commission contends that so long as its regulation of television communications has a "reasonable" purpose in the public interest, the *NBC* doctrine insulates the regulatory action from First Amendment infirmity even though the same activity if applied to other media, such as newspapers, would offend the constitutional guarantee. Thus, in the context of the First Amendment, the broadcast media is said to have less constitutional protection than the printed media. The Seventh Circuit explains that this distinction in treatment between means of dissemination, *i.e.*, radio and newspapers, merely begs the question and requires a test of reasonableness in light of the First Amendment. The Court stated (slip opinion, pp. 24-25):

> The Commission argues (relying on *National Broadcasting Co. v. United States*, 319 U.S. 190 (1943)) that "since radio is inherently not available to all, its use may be constitutionally regulated in the public interest." What the Commission urges upon this court is the argument that once the need for some regulation of radio and television

[4] 47 C.F.R. §§73.123, 73.300, 73.598, 73.679.

> licensees is recognized – to insure that broadcasting facilities are in the hands of those most qualified and to eliminate interference and other technical problems – it must follow that the Commission's power extends to the promulgation of other kinds of regulations. According to the Commission, a failure to make this concession results in the Commission's inability to impose any regulations, technical or otherwise. This argument begs the question at issue which is, whether the need for technical, financial, and ownership regulation of radio and television licensees sufficiently distinguishes this group from newspaper publishers so as to warrant sustaining the imposition of burdens on radio and television licensees which would be in flat violation of the first amendment if applied to newspaper publishers.

In the instant case, the Commission has not even attempted to demonstrate a valid distinction between television licensing and the printed media. Its position has been that, since it has authority to regulate radio and since the exercise of this authority has been in furtherance of its concept of the public interest, it need not consider the consequences of the regulation's limitation on free speech. We contend, on the other hand, that examination of reasonableness and the public interest in mass communications must begin with the First Amendment rather than stop short of it.

In *NBC*, Justice Frankfurter, after describing the chaos created by unlicensed broadcasting, devotes but one paragraph of his 37-page opinion to the First Amendment, and concludes that a denial of a license for a broadcast station in the public interest is not a denial of free speech. Implicit in this conclusion is the finding that radio licensing preserves and promotes free speech rather than restricts it, since if everyone were to broadcast no

one could be heard. The same rationale has no application to cable television since it occupies no spectrum space, nor does the non-duplication rule pretend to promote free speech.[5] *NBC* does not support application of a restraint on *reception* or cable distribution of programs merely because the program has been broadcast by a station duly licensed by the Commission. From the narrowly applicable statement in *NBC*, the Commission has asserted blanket authority to regulate public reception without regard to the First Amendment – a possible misconstruction of the opinion forewarned by Justice Murphy in his dissent, 319 U.S. at 228.

The Seventh Circuit has brought *NBC* back into perspective and casts the burden upon the Commission to justify the reasonableness and need for any regulation which limits the exercise of free speech. While we recognize that there is a difference between the precise issue before the Seventh Circuit (actual expression of opinions) and the issue in the instant case (distribution and broader competitive means for expression of opinion), the underlying legal principles and constitutional issue are the same, since both expression and means of distribution have been held to be equally deserving of constitutional protection.[6]

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[5] In fact, the reverse is true; CATV programming is largely free of the economic, social, and technical pressures of scarce frequency space. In the current state of the art, CATV can make available from 20 to 40 television channels – up to 50% of home receiver capacity, whereas the average number of operating commercial TV stations per television market is only 2.9.

[6] "The right of freedom of speech and press includes not only the right to utter or to print, but the right to distribute [and] the right to receive . . ." *Griswold v. Connecticut*, 381 U.S. 479, 482 (1965).

We feel that the significance and ripeness of the question presented in this petition cannot be overstated. Television is fast becoming (if not already in fact) the dominant medium of mass communications. If precious constitutional guarantees are to be preserved only for the written word, free expression of ideas and access to divergent opinion may well be effectively removed from the great majority of Americans and thus from the process by which public opinion is formulated. Encouraging, protecting, and nurturing new means of distribution of news and information are essential to protect the public interest in a democratic society. Yet, distribution sources in the United States are narrowing rather than expanding – the decline in newspaper publication; network dominance in television; cross-ownership in radio, television and newspapers are all alarming aspects of this constriction. And the agency charged with protecting the public interest in the communications field, sensitive primarily to pressures from the conventional broadcast industry, devotes most of its limited attention to technical and parochial industry problems. Sensitive awareness to constitutional guarantees must be impressed upon the agency at this critical time when the regulative yoke is being fastened on the neck of a new industry with the means for facilitating virtually unlimited expression without spectrum limitation.

CONCLUSION

For the foregoing reasons, and for the reasons set forth in the petition, the writ of certiorari to the Tenth Circuit Court of Appeals should issue.

Respectfully submitted,

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